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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 306

THE ASSOCIATED PRESS, Petitioner,

vs.

EDWIN A. WALKER, Respondent.

On Writ of Certiorari to The Court of Appeal For The Second Circuit of Louisiana and The Supreme Court of Louisiana.

PETITION FOR REHEARING

Respondent, Edwin A. Walker, prays that this Court grant a rehearing of its order of October 16, 1967, granting a Writ of Certiorari, reversing the judgment of the Louisiana Supreme Court and Court of Appeal for the Second Circuit of Louisiana. The state courts had affirmed the findings of a jury and judgment of the trial court granting to respondent damages to the extent of $75,000 for libel.

An extension of time to November 20, 1967, was granted to respondent by Mr. Justice Black for the filing of this petition.

REASONS FOR GRANTING PETITION FOR REHEARING

Preliminary Statement

It is respectfully submitted that this Court has erred in reversing the judgment of the Louisiana Appellate Courts on the basis of the conclusions reached in the Butts case which was consolidated with the Texas case of *Associated Press vs. Edwin A. Walker*, Docket No. 150, 388 U.S. 130, 18 L.ed. 2d 1094. That case will hereafter be referred to as the "Texas case" in so far as Walker is concerned, or generally as the "Butts case."

Whether the ruling of the Court in the present proceeding was made on the basis of res judicata or stare decisis does not appear in the per curiam of the court, which reads:

> "The petition for a writ of certiorari is granted. The judgment is reversed and the case is remanded for further proceedings not inconsistent with *Curtis Publishing Co. v. Butts*, 388 U.S. 130.
>
> Mr. Justice Black, with whom Mr. Justice Douglas joins, concurs in the result for the reasons stated in Mr. Justice Black's concurring opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967)."

No plea of res judicata has been filed and it seems that the Texas case is still pending on remand for further proceedings in view of the decree of this Court in Docket No. 150, which reads as follows (18 L.ed. 2d 1115):

> "The judgment of the Texas Court of Civil Appeals in No. 150 is reversed and the case is remanded to

that court for further proceedings not inconsistent with the opinions that have been filed herein by The Chief Justice, Mr. Justice Black, and Mr. Justice Brennan."

The reversal of a judgment and the remanding of it to a lower court for further proceedings, do not constitute a decision that can be pleaded as an estoppel, or res judicata.

Aurora vs. West, 7 Wall. (74 U.S.) 82, 92, 93, 19 L.ed. 42, 46.

The Texas Case Differs in Fact and in Law

The Texas case is not identical as to facts or law with the present proceedings although both cases have a common origin in the riots that broke out on the Mississippi University campus on September 30, 1962. The pleadings are not the same, the causes of action are different, the issues as to malice in the publication of the libel are at variance, and the findings of the trial and appellate courts are opposite in so far as malice is concerned.

We are aware that the original brief filed herein stated that the parties, the subject matter, and the evidence, so far as Associated Press is concerned, are identical except for some additional evidence and witnesses that were produced in this case which will hereinafter be referred to as the Louisiana case. This broad statement is misleading and probably influenced Your Honors to summarily reverse the findings and decrees of the Lou-

isiana courts. The above referred to statement is true as far as it goes, but it does not go far enough. There are many differences between the two cases which call for a different conclusion in the Louisiana proceeding. We will point out these differences:

1. The Texas case involved a single publication in the Fort Worth Star Telegram on October 3, 1962, and was limited to damages sustained by reason of that publication in the State of Texas.

   The Louisiana case involves numerous news articles published in the New Orleans Times-Picayune and States-Item newspapers, over a period of eleven days, and related to damages in the State of Louisiana.

2. The parties were different although the Associated Press was a defendant in both cases. The Fort Worth Star Telegram was a party defendant in the Texas case although the claim against it was non-suited when the matter came to trial.

   The New Orleans newspapers are still involved as defendants in the Louisiana case on review before the Supreme Court of Louisiana. Judgment was rendered against them and the Associated Press jointly and in solido, as joint tort feasors.

3. No plea of malice was made in the pleadings of the Texas case (393 SW 2d 683) whereas the petition in the Louisiana case alleged that 'one of defendants' employees and agents, a reporter by the name of Van H. Savell, made

completely false, unfounded, and malicious report of plaintiff's activities to the effect that plaintiff had organized and led the riots that had occurred at the University; and defendant, Associated Press, thereafter falsely, irresponsibly and maliciously published and disseminated said news reports" in Louisiana and elsewhere. (Tr. 10)

4. The Texas case included a claim for punitive damages, and under Texas law a claim for such damages can be sustained only by a showing of malice in the sense of evil intent, vicious motive or a conscious indifference to the right or welfare of the injured party.

The Louisiana case made no claim for punitive damages. Such damages are not allowed in Louisiana. The proof of malice on the part of the defendants consisted of evidence to show that the defamatory reports were knowingly false and made with reckless disregard for the truth. Evil intent and vicious motive were not considered as malice within the rules laid down by this Court. (1)

5. This Court's opinion in the Texas case states that "The trial judge, however, found that there was 'no evidence to support the jury's answers that there was actual malice' and refused the punitive award." However the Court of Civil Appeals of Texas did affirm the jury verdict and judgment of the trial court as to

(1) In *Garrison*, 379 U.S. 74, this Court said that "only those false statements made with a high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions."

In the case at bar the record presents evidence and findings which were not present in the Texas case, and the Court of Appeal for the Second Circuit of Louisiana perhaps took the facts and the law as required by Article [illegible], Section 10 of the Constitution of Louisiana. That court approved the findings of the jury, and the judgment of the trial court on the issues of fact and actual malice anyway. (193 So. 2d 727, 730).

(1)

The Supreme Court of Louisiana denied a writ of review and affirmed the ruling of the Court of Appeal (250 La. 98, 194 So. 2d 97).

Admissions by Associated Press in Case at Bar Contradict Fact Pleadings in Texas Case.

Since this Court reviews the facts in libel cases, and the Texas case was decided in accord with "the factors which arise in particular context" of that case (Slip Opinion 16) the Court should "undertake a parallel evaluation here." There is an admitted fact in the record of this case which completely negatives the "trustworthy source" of the libelous statements published by the Associated Press, and would have called for an opposite opinion in the Texas case.

The admitted fact in the record of this case is that the reporter, Van Savell, who sent in the false reports and wrote a defamatory "first person article" concerning General Walker, was not a *free-lance correspondent* in whom the Associated Press had a great deal

In paragraph 7 of the Plaintiff's original petition, repeated in the first and second amendments thereto, (Tr. 10, 67, 100, 101) it is alleged:

"During the course of events of the evening of September 20, 1962, and at a time unknown to Plaintiff, one of the Associated Press employees and agents, a reporter by the name of Van H. Savell made a completely false, unfounded, and malicious report of Plaintiff's activities, to the effect that Plaintiff had organized and led the riots that had occurred at the University; and defendants, Associated Press and Times-Picayune, together and acting in concert thereafter falsely, irresponsibly, and maliciously published and disseminated said news reports."

In answer to the foregoing allegations the Associated Press admitted that Savell was its employee. Paragraph 1(a) of the Associated Press answer admits (Tr. 288):

"That answer to the allegations of paragraph 7 of plaintiff's petition, as amended, defendant The Associated Press admits that on or about October 3, 1962, Van H. Savell, an employee of defendant, The Associated Press transmitted to defendant The Times-Picayune Publishing Corporation in the City of New Orleans, Louisiana, a news report of which a photostatic copy is attached to plaintiff's petition as amended, and marked exhibit 'A'."

(8)

which was thereafter published by defendant The Times-Picayune Publishing Corporation and the New Orleans States-Item, and that defendant The Associated Press transmitted to defendant The Times-Picayune Publishing Corporation additional and other news reports concerning plaintiff."

In paragraph 11 of Plaintiff Walker's amended petiton in this case, the following allegations are made (Tr. 211):

"During the period of October 1 - October 6, 1962, the Defendant, Associated Press, continued to send out news items and bulletins for publication of the details concerning Plaintiffs arrest and incarceration, reports concerning his sanity and alleged mental disturbances, and additional false statements to the effect that he had taken part in the riots at the University of Mississippi and was accordingly guilty of inciting insurrection and seditious conspiracy against the United States Government. Said news items and bulletins were telegraphed for publication and were published by Defendant Times-Picayune Publishing Corporation."

In answer to the allegations just quoted, the Associated Press replied (Tr. 265):

"In answer to the allegations of paragraph 11 of plaintiff's petition, as amended, defendant The Associated Press admits that, during the period October 1, 1962, to on or about October 11, 1962, it transmitted to defendant The Times-Picayune Publishing Corporation in the City of New Orleans, Orleans Parish, Louisiana, news dispatches pub-

stantially in the form set forth in Exhibit 4, Exhibit 5, page 1 of Exhibit 6, the first two paragraphs on page 2 of Exhibit 6 and pages 3, 4, 5 and 6 of Exhibit 6, attached to plaintiff's petition, as amended, and that these news dispatches were published by defendant The Times-Picayune Publishing Corporation in its two newspapers, The Times- Picayune and The New Orleans States-Item."(1)

The admissions in the pleadings are verified by the evidence. Savell, on direct examination, testified (Tr. 2539):

"Q. As so by whom were you employed in September 1962, Van?

A. The Associated Press.

Q. And in what capacity?

A. As a news reporter."

It thus appears that an employee, not a free-lance correspondent, of The Associated Press originated charges of criminal conduct against General Walker and that these charges were repeated and republished during a period of eleven days. In view of these facts which were overlooked by Your Honors, it is quite apparent that The Associated Press is liable in damages to the Plaintiff in this proceeding.

(1) The articles referred to repeated statements that General Walker led riots at the University, that his sanity was questioned, and that criminal charges had been filed

Libel Authored by Associated Press Reporter is in Legal Effect an Act of The Associated Press Itself

The Associated Press nowhere denies the right of its reporter to look after its newsgathering interest and functions nor does it claim either in the pleadings or in the evidence that Savell or any of its reporters who may have written subsequent articles, based on Savell's report, were acting outside of the scope of their employment. Savell's first news dispatch concerning plaintiff's activities at Oxford, Mississippi, was received in the New Orleans office by Ben Thomas who announced it to the staff on duty on the night of the riots, September 30, 1962. Louis Milliner, the news editor, without further confirmation sent the defamatory news around the world (Tr. 1513, 1516). During the eleven succeeding days no effort was made to verify the false charges against General Walker which were repeated in substance in succeeding news articles. This defendant has ratified and confirmed the acts of its reporters, employees, and agents and still maintains that their stories are true.

It matters not whether the Associated Press refers to Savell as an employee or as an agent, because "A master is a species of principal and a servant is a species of agent." *(Restatement of the Law of Agency*, 2nd, Sec. 2a). In this case the Associated Press reporters were employed as agents for the purpose of gathering news for their principal. The general rule is that the principal or master is liable civilly for the tortious acts of his agent or employee which are done within the course and scope of the agent's or servant's employment.

Latrobe vs. Domestic & Foreign Commerce Corp., 332 U.S. 682, 92 L.ed. 1628.

Gleason vs. Seaboard Air Line Ry. Co., 278 U.S. 349, 73 L.ed. 415.

Bank of Kentucky vs. Adams Express Co., 93 U.S. 174, 23 L.ed. 872.

The act of an agent within the sphere of his authority is as binding on the principal as if it had been done by the principal himself.

Vicksburg & Meridian Ry. Co. vs. O'Brien, 119 U.S. 99, 30 L.ed. 299.

Hoffman vs. John Hancock Mutual Ins. Co., 92 U.S. 161, 23 L.ed. 539.

A principal is liable for slander or libel uttered or published by his agent within the scope of his agency or employment. This court has followed that rule.

Washington Gaslight Co. vs. Lansden, 172 U.S. 534, 543, 43 L.ed. 543, 547.

Philadelphia W&BRR Co. v. Quigley, 21 How. (62 U.S.) 202, 209, 210, 16 L.ed. 73, 75.

Aetna Life Ins. Co. vs. Brewer, 12 F. 2d 818 (CA8C), 46 A.L.R. 1429 and cases cited.

Aetna Life Ins. Co. vs. Mutual Benefit Health & Acc. Assn., 68 F. 2d 116, 120 (CA8).

National Ref. Co. vs. Benzo, 20 F. 2d 763,

This Court apparently assumed that a newspaper or other publishing corporation is liable in damages for

defamation [illegible] by agents he employs. In the course of their employment [illegible] York Times and *Butts* cases [illegible] U.S. 374, 17 L.ed. 56, 456.

As a matter of fact, this Court specifically held in the *Butts* case, slip opinion, page 17, that a newspaper has no special immunity in the law of libel, saying:

> "The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may with impunity in both cases quit that activity and escape from liabilities designed to safeguard the legitimate interests of others. A business is not immune from regulations because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others.' *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132-133."

Since the record in the case at bar shows that the various libelous publications, [illegible] by the Associated Press over a period of eleven days, were all based on the false [illegible] account of Wm. Sewell — admittedly a regular [illegible] employee — not a trustworthy correspondent who obtained the story from trustworthy sources — it follows that the acts of Sewell and his co-workers [illegible] in the course of their employment and the acts of the Associated Press [illegible]

[illegible] New York Times [illegible]
[illegible] New York Times rule concerning malice is quite similar, and the jury, the trial judge, the Court of Appeal and the Supreme Court of Louisiana so held. The Court of Appeal cited Walker vs. Associated Press, 101 So. 2d 747, at page 752:

"It is significant that the words complained of relate to actions and conduct which were represented as positive statements of fact, partially [illegible] as reported there were no material admissions or error initially made therein. The statements were either false or true and knowingly represented as such. Forasmuch as falsity and truth were for the jury and as this assertive statement implied the conclusion that the representations were made with knowledge of their falsity or with reckless disregard for the truth. We therefore find that the words were libelous per se and made with actual malice." 881

In the [illegible] page 7, Your Honors stated:

[illegible] Press, [illegible] out of the description of a news dispatch giving an erroneous account of events on the campus of [illegible] when a [illegible] a person [illegible] report [illegible]

In view of the proved falsity of the Associated Press employee's eye-witness report, this case falls within the principle enunciated by this Court in *Garrison v. Louisiana*, 379 U.S. 64, 13 L. ed. 2d 125, 135:

port of Sorrell on the Associated Press. These remarks run counter to the *New York Times*, *Garrison*, *Rosenblatt* and *Time*, *Inc. v. Hill* cases which hold that ill will or evil intent are irrelevant. As the Court said in *Garrison v. Louisiana*, 379 U.S. 64, 74, 13 L.ed. 2d 125, 133:

> "Only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of civil or criminal sanctions."

Similarly, the basic opinion in the *Butts* case makes a distinction between "hot news" for newspapers and ordinary scandal in weekly publications. This distinction cannot rub out the legal consequences of the "de, knowingly and deliberately published" or the "calculated falsehood" referred to in *Garrison* (379 U.S. 74, 13 L.ed. 2d 136). The real test adhered to by the majority of the justices of this Court in the *Butts* case, is that defamatory falsehood consists of a "statement made with actual malice — that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (*New York Times*, 376 U.S. 279, 11 L.ed. 2d 706). However, in the case at bar, the false statements were repeated over a period of eleven days, and could hardly be "hot news" during this entire period of time.

"In an attempt to prove malice it is impossible to probe the heart or mind of the defendant to ascertain whether or not there was malice, hatred, ill will or enmity or a wanton desire to injure, but the best proof of that state of mind is what he says and does with reference thereto, both before and after the defamatory statement is published."

And in *Wigmore on Evidence*, Vol. 2, page 272, Sec. 405 the author quotes *Gribble vs. Press Co.*, 84 Minn. 345, 34 NW 710, thus:

"The fact that a given libel has been preceded and followed by others of like tenor from the same source is one from which, as men are constituted, a legitimate inference may be drawn as to the 'animus', the spirit with which the given libel was published. It has a fair tendency to show that the given libel was not published by accident or mistake, or even under a sudden impulse, or heedlessly, but by design and with a deliberate purpose to injure and prosecute the person libelled."

See also 53 C.J. 822, 823 and cases cited.

The above citations negative the idea that "hot news" can be used as an excuse or defense by a daily newspaper or newsgathering agency, when that same publication makes a daily repeat of the false charges over a period of eleven days. This is particularly true when defendant's competitor, The United Press International, published accounts of General Walker's conduct directly opposed to that of the Associated Press immediately after the events occurred. Associated Press simply did not follow "accepted publishing standards" which standards this

Court does not explain and are, in any event, irrelevant to the issue of malice.

In so far as motive or state of mind is concerned, inferences must of course be made — as this Court said in *White* vs. *Nicholls*, et al, 3 How. 267, 11 L.ed. 591:

"Falsehood and lack of probable cause will amount to proof of malice."

The "eye-witness report" not only falsely reported General Walker's activities but also falsely quoted his speech on the monument during the riots. It was false in every relevant detail. It was true only in two unimportant particulars: (1) Walker was there and (2) he made a speech at the Confederate Monument. The Associated Press reporter Savell made no attempt to verify any detail of his story. Though Walker was always in sight and hearing, never more than six feet away from Savell (Tr. 2560, 2564, 2567), this reporter never questioned Walker at all, nor did he confer with the three other Associated Press reporters on the scene (Tr. 2547). Could this meet "accepted publishing standards"?

The Constitution Does Not Value "Free Speech" Above Human Character and Reputation.

The four-justice opinion in *Butts* states that (Slip Opinion, page 17):

"History shows us that the Founders were not always convinced that unlimited discussion of public issues would be 'for the benefit of all of us' but that they firmly adhered to the proposition that true liberty of the press' permitted every man to publish his opinions."

To the above we may add that it is not logical or reasonable to believe that our Founding Fathers intended to place the guarantee of freedom of speech and of the press contained in the First Amendment to the Constitution above, or even on a parity, with the guarantee of life, liberty, and the pursuit of happiness — essentials that the Constitution also seeks to protect, and which form the tried foundation on which any decent civilized government may be established.

We have been told that our human laws are the copies, more or less imperfect, of the Divine Laws so far as we can read them. The redactors of the Constitution were religious men who invoked the blessings of Almighty God at every session of their labors on the fundamental law of this nation. They were aware of the admonition of the Old Testament prophet that "death and life are in the power of the tongue" and that "a false witness shall not be unpunished." When they provided protection for life, liberty, and property, they must have remembered that "a good name is rather to be chosen than great riches." Are we to forge [illegible] ancient chronicles of wisdom in the name of modern expediency, or for the sake of a morbidly curious public? If character assassination without legal retribution becomes a cornerstone for free speech or freedom of the press, we may soon find this nation in the graveyard of forgotten republics.

This Court has stated to the contrary many times in its opinions in the *Butts* case, in *New York Times*, *Garrison* and *Rosenblatt* among others. In *Butts*, Your Honors stated, on page 8 of the slip opinion, that it would

be constitutionally inadequate to protect freedom of the press only in a limited field, but what would be equally unfortunate would be a rule "which goes far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication." Your Honors also cite the ruling in *Associated Press vs. N.L.R.B.*, 301 U.S. 103, that the publisher of a newspaper "has no special privilege to invade the rights and privileges of others." Again (Slip Opinion, page 19) the *Butts* opinion quotes Section 108 of *Prosser on Torts*:

> "But the basic theory of libel has not changed, and words defamatory of another, are still placed 'in the same class with the use of explosives or the keeping of dangerous animals.'"

And in *Rosenblatt vs. Baer*, 383 U.S. 86:

> "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."

In the same case the concurring opinion of Mr. Justice Stewart states:

> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty."

In *Garrison vs. Louisiana*, 379 U.S. 79, This Court said:

> "The use of calculated falsehood, however, would put a different cast upon the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free

speech, it does not follow that the lie, knowingly, and deliberately published about a public official, should enjoy a like immunity."

CONCLUSION

Your Honors have not applied the exalted ideals of human dignity and vital concepts of decent government expressed in prior opinions to the facts of the case at bar. It is possible that this Court has inadvertently prejudged the present case on the conclusions reached in the Texas proceeding. Although the two cases have the same origin, the libels complained of differ in number, times, text and means of publication; the pleadings and findings of the lower courts are quite different; the scope of the two actions differ materially, and the facts presented in the Louisiana case call for the opposite conclusion. To remedy the wrong done to the respondent, it is respectfully submitted that a rehearing be granted.

Respectfully submitted,

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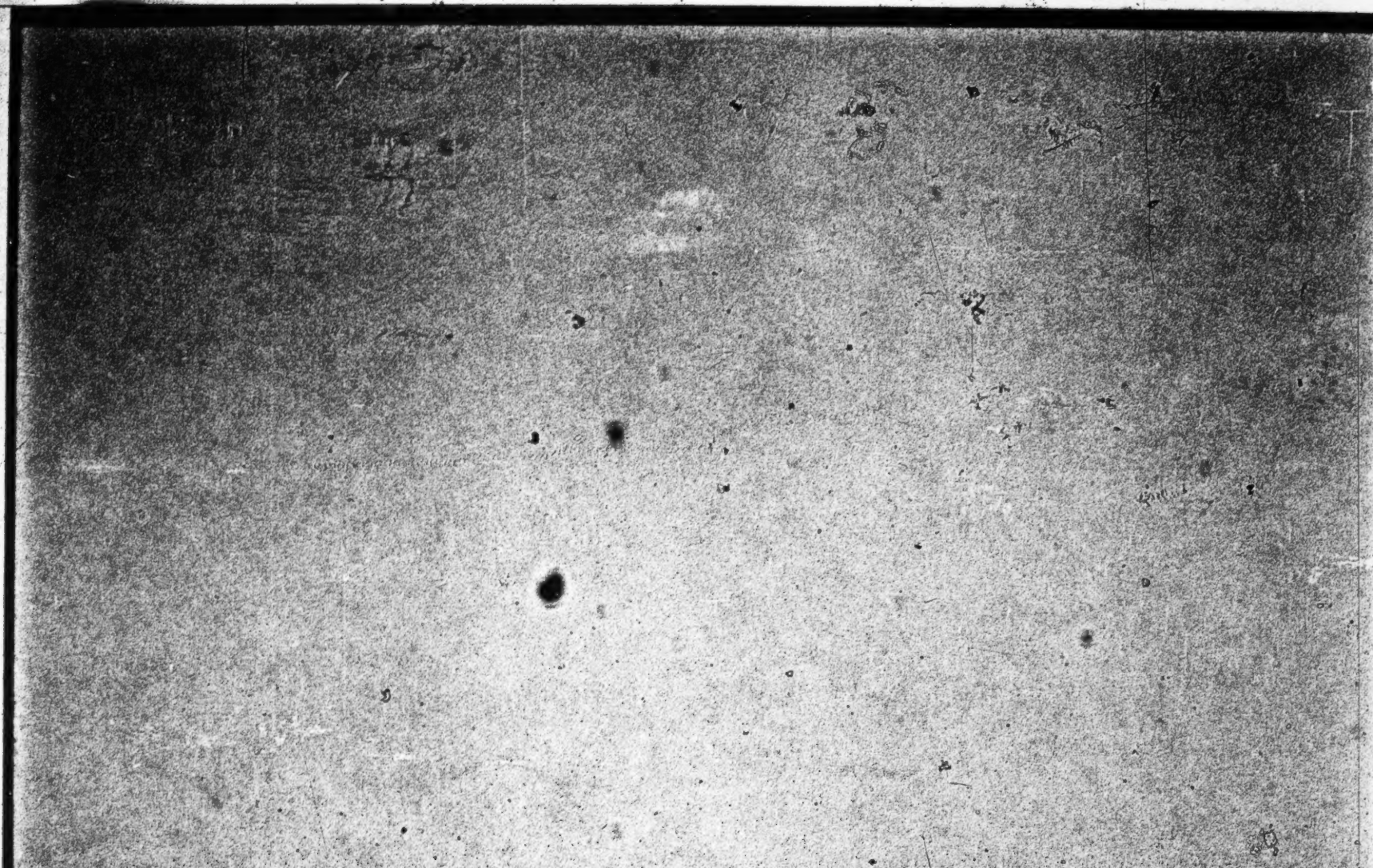
CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the Rules of the Supreme Court of the United States.

I further certify that copies hereof have been served on opposing counsel of record by mailing copies of the same to them at their respective addresses, postage prepaid, this 15th day of November, 1967.

ORIGINAL SIGNED
W. SCOTT WILKINSON

W. Scott Wilkinson
of Counsel for Respondent,
Edwin A. Walker.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

THE ASSOCIATED PRESS *v.* WALKER.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT.

No. 306. Decided October 16, 1967.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment is reversed and the case is remanded for further proceedings not inconsistent with *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurs in the result for the reasons stated in MR. JUSTICE BLACK's concurring opinion in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 170 (1967).